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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 534

CARVEL CORPORATION,
Petitioner,

against

ROBERT J. GRISWOLD, TRUSTEE, *ET AL.*,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported in 408 F. 2d 1338 and is

printed herein as Appendix A to this petition. The opinion of the District Court of the District of Puerto Rico is not reported.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered April 9, 1969. The jurisdiction of this Court is invoked under Title 28 U.S.C. 1254(1).

Questions Presented

1. Whether the finality of an intentional tort judgment rendered by a New York Court which precisely fixes the liquidated amount absolutely owing thereon, whether then payable or not, is sufficient to be provable under section 63a(1) of the Bankruptcy Act, 11 U.S.C. 103a(1), or must that rendered judgment also be ministerially entered by a clerk of that New York Court prior to the date of the filing of the petition in bankruptcy.

2. Whether Section 63a(1) of the Bankruptcy Act, 11 U.S.C. 103a(1), was intended to be applied so as to destroy the provable rights of an entire class of creditors, in whose favor judgments have been rendered, by the preference of other creditors whose claims are no more ascertainable than the first class.

Statute Involved

Bankruptcy Act, Section Sixty-three (11 U.S.C. 103).

63. Debts Which May Be Proved. a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely

owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest . . .

Statement of the Case

Louis G. Greenfield, the bankrupt, was a partner in the now defunct New York City law firm of Greenfield, Rothstein, Klein & Yarnell. Both claims[1] involved here arose out of the activities of the bankrupt's law firm.

In March, 1962, Coclin's attorney of record engaged the bankrupt's law firm for the purpose of bringing a private antitrust suit against Brown & Williamson Tobacco Company and British American Tobacco Company. Coclin paid a $15,000 retainer, one-third of which ($5,000) was referred to Coclin's attorney of record, and on April 25, 1962, a complaint was filed in the Southern District of New York. In June of 1963 the bankrupt's law firm failed to appear when Coclin's case was called and the case was dismissed for lack of prosecution.

Coclin discovered the dismissal, and after a period of inactivity, it retained a new law firm and sought to restore the case to the docket. When attempts to restore the case failed, a new complaint was filed and that case under the new complaint has since been settled.

Coclin seeks to recover all monies spent under the retainer with the Greenfield law firm. The precise amount of these monies is not now liquidated. Coclin is a creditor of the Greenfield law firm partnership (not a bankrupt) and not of the individual bankrupt.

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[1] The two major unsecured creditors of the bankrupt estate were "Coclin" and "Carvel". Actually, "Carvel" is the collective term for eight separate claims (Nos. 6, 7, 8, 9, 10, 11, 13, and 14) which appear at pp. 16-23 in the transcript below.

Carvel's claim rests upon a judgment of the New York Supreme Court rendered against the bankrupt for the intentional act of conspiracy with others to bring false and baseless lawsuits. The decision after inquest directed judgment for Carvel in the fixed amount of $11,580,488.34 and was rendered on April 11, 1966 by the State Court judge. The judgment was entered by the State court clerk on July 25, 1966. Carvel is an individual creditor of the bankrupt.

On May 16, 1966, the bankrupt filed his petition in bankruptcy in the United States District Court for the District of Puerto Rico.

The referee allowed Carvel's claims and disallowed Coclin's claim; the District Court affirmed the referee; but the Court of Appeals reversed (see appendix A).

Reasons for Granting the Writ

There are several important reasons why the Writ of Certiorari should be granted in this case:

1. The implication by the Court of Appeals that there is a distinction between claims arising under a contract and those arising from a judgment, which distinction has no rational basis for purposes of bankruptcy.

2. The presumption by the Court of Appeals that a rendered judgment which absolutely fixed a precise liquidated amount could not be asserted as a claim because such a judgment is not final until a clerk makes ministerial notation of same even though the judge (and court) that rendered it could no longer relitigate the issue or change the amount.

3. The authority of the decision by the Court of Appeals upon a question which reveals very little previous clear authority will have the effect of permitting the un-

intended and destructive application of section 63a(1) of the Bankruptcy Act, 11 U.S.C. 103a(1), to a broad class of injured people with ascertained and fixed claims being shunted aside by others who have unascertained, if provable, claims.

The Carvel claims were disallowed by the Court of Appeals, for the purposes of the Bankruptcy Act, on the ground that "under New York law a judgment is not final until entered" (7a).[2]

The fact is that the Carvel judgment was not *entered* until July 25, 1966 (a copy of same is annexed to each of the eight "Carvel" claims; see footnote No. 1). This "entry (on July 25, 1966) did not occur until three months after rendition" (7a). The judgment was rendered on April 11, 1966 by the New York State Supreme Court for Westchester County after an *inquest* on February 28, 1966 before Judge Coyle of that Court who directed that judgment be thereafter entered in the precise liquidated amount that he fixed on April 11, 1966.

So there was a gap of "three months" (7a) between rendition and entry. During that gap, actually on May 16, 1966, the bankrupt filed his petition in bankruptcy in the District Court in Puerto Rico relying on that rendition of April 11, 1966 as the event underlying his bankruptcy (see petition of bankrupt).

Citing the "narrow avenue for the proof of intentional tort claims in bankruptcy" (8a) the Court of Appeals refused to allow Carvel's claim holding that an intentional tort claim is not a "final" claim provable in bankruptcy until judgment is entered (7a) and since the filing of the petition (May 16, 1966) preceded entry (July 25, 1966), Carvel's claim cannot be provable.

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[2] Numbers in parentheses followed by the suffix "a" refer to pages of the printed appendix herein.

As support for its holding the Court of Appeals relied upon the 45-year-old decision in *Lewis* v. *Roberts*, 267 U. S. 467 (1925), which it interprets to say that the general rule of tort claims being not provable in bankruptcy has a single exception which "is the only exception for intentional tort claims—where the claim has been reduced to judgment prior to the filing of the petition in bankruptcy" (4a). In an interesting footnote to its citation of *Lewis* v. *Roberts*, the Court of Appeals describes this narrow treatment of tort claims as "peculiar" and says that this restrictive approach is historical rather than logical.

The footnote is interesting because its acknowledged source is a passage from 3A *Collier*, Bankruptcy Par. 63.25 (1) (14th ed. 1968). Collier says, at page 1891, as follows:

> "Par. 63.25 TORT CLAIMS
>
> (1) Tort Claims generally not provable.
>
> Claims based on tort such as a wilful or negligent injury to person or property are ordinarily not provable in bankruptcy. (citing *Schall* v. *Camors*, 251 U. S. 239 in a footnote). The reason for this traditional principle is historical rather than rational. It governed and continues to govern the English bankruptcy law, and may be due to the fact that bankruptcy law was in its origin a proceeding devised primarily for the purpose of liquidating commercial transactions. Rationally, there is no conclusive reason for treating a creditor *ex lege* any worse than a creditor *ex contractu*, and in fact our own Bankruptcy Act recognizes at least a few important exceptions to the general rule, as will be discussed subsequently. Yet, unless a claim *ex delicto* can be said to come under one of the recognized exceptions, it is under the present law not provable."

Two factors are at once apparent from the sources of authority cited by the Court of Appeals. For one thing,

Collier says there are "at least a few important exceptions to the general rule" thus disputing the Court of Appeals statement of only one exception (4a), *supra*. For another thing, *Lewis* v. *Roberts* in 1925 is not authority for the proposition that only one exception to the general rule exists in 1969. This court observed there, at p. 471, that the earlier case of *Schall* v. *Camors*, 251 U. S. 239 (1919), which more nearly supports the decision below, did not support the conclusion that an ordinary tort claim which was previously reduced to judgment was not a provable debt. Surely it can be said, that this court, even then, was moving away from the "restrictive approach" of the last century (4a, footnote No. 7).

And *Collier* examines one of those "important exceptions to the general rule" at p. 1891, *supra*. It says that:

> "An originally unliquidated tort claim that is subsequently liquidated by a judgment is provable under Sec. 63a(1), provided, as is true of *any judgment claim*, that judgment is *rendered* prior to the commencement of bankruptcy proceedings." (emphasis supplied)

Notice, nothing is said about the necessity of *entry* of the already liquidated amount prior to bankruptcy. But the Court of Appeals apparently holds that entry is a prerequisite for the necessary finality (7a) even though they recognize that entry is not necessary for certain purposes (6a). Probably, the Court of Appeals was impressed by the sentence in *Collier* following the last quoted portion which says that an entered judgment merges the claim and prevents the court from "going behind" the merger; this sentence footnotes *Lewis* v. *Roberts*.

But the preceding quoted portion seems to be more relevant. It also refers the reader to an earler related section in *Collier* (Par. 63.10) at p. 1829, which deals with the preliminary problem of entry only, without regard to liquidation, but gives a hint of things to come, where there is

a liquidation, by citation of *In re Ganet Realty Corp.*, 83 F. 2d 945 (2d Cir. 1936), which held, most importantly, that because a previous order liquidated the amount due and owing, the entry of a judgment based thereon, which did not occur until after the filing of the petition, was ministerial only and not a prerequisite for the finality necessary to provability of the claim. Actually, the Court of Appeals was not impressed by the *Ganet* case, presumably because the claim was of a nature which would have been provable without a judgment anyway (7a, footnote No. 11). But, it is respectfully submitted, the position is really the same in this case. That is, the New York court liquidated the precise amount due and owing, after an inquest, on April 11, 1966. Nothing needed to be done with respect to the finality of the actual amount. In this regard, the New York court was *functus officio* and without authority to change either its decision or the liquidated amount (*People ex rel. Hess* v. *Finn*, 27 N. Y. Supp. 2d 80 at 82; *Fox* v. *Johnson & Wimsatt*, 127 F. 2d 729 at 736).

Thus, the *Ganet* case is important here for what it says; i.e., that liquidation of a fixed amount is provable, rather than for what it was; i.e., a provable claim regardless of judgment. This analysis is supported further in *Collier* at p. 1829 in the same footnote by reference to *Matter of Benevolent and Protective Order of Elks*, 9 F. Supp. 883 (E.D.N.Y. 1935), where the court disallowed a deficiency judgment "because . . . it was not known what the deficiency amounted to in dollars and cents". The implication is, of course, that if the amount was known, the court would have allowed it. Here, as in *Ganet*, the amount was known. Here, as in *Ganet*, entry of the judgment should have been only ministerial. In other words, the result reached below is as if the Court of Appeals overlooked the event of the inquest and the liquidation reached there which, under the important exception noted in *Collier*, but disregarded by the Court of Appeals which

relied on *Collier,* should have made Carvel's "originally unliquidated tort claim that is subsequently liquidated" provable just like "any judgment claim". Naturally, the ministerial function of entry by the New York State court clerk was not necessary to the requisite finality already provided by the liquidation of the amount on April 11, 1966.

It is respectfully submitted that this is the real direction of this court; i.e., to move away from the restrictive approach that is historical rather than rational. Judicial authority is scanty but the 45-year-old case of *Lewis* v. *Roberts* was really a start in that direction. So now, *Collier* can say that there is no reason for treating a tort creditor different from a contract creditor and that any distinction between the two is not rational. But the Court of Appeals, while agreeing that such a difference in treatment is "peculiar" still makes that distinction and applies it here. We submit that the application of that distinction here is erroneous because the circumstances below permit this case to come within one of the exceptions to the general rule, *supra,* which exception is disregarded by the Court of Appeals which insists on a "merger" in the case of a claim arising from a judgment.

If the restrictive approach of the Court of Appeals is adopted here, with a resultant tightening of exceptions, we will face backwards into a different era which could not contemplate a more harmful injury than a commercial debt. Unfortunately, equal if not greater harm can now be visited upon individuals and businesses (Greenfield's intentional injury to Carvel was a commercial tort) *ex delicto.*

Moreover, the broad equity power vested in bankruptcy court permits admission to proof and allowance of claims based on principles of equity (as well as disallowance on equity grounds); see *Matter of Van Winkle,* 49 F. 2nd 11 (W. D. Ky., 1943); *Yager* v. *Liberty Royalties,* 123 F. 2nd

44 (10th Cir., 1941); *Seiden* v. *Southland Chenille's Inc.*, 195 F. 2nd 899 (5th Cir., 1952). Equitable grounds supporting Carvel's claim are plainly evident from the fact of Greenfield's reliance upon the rendition of April 11, 1969 as the principal event underlying his insolvency (see Petition in Bankruptcy). Further, the harm caused by the bankrupt to Carvel was deliberate. And although the unliquidated matter of Coclin's claim does not bar its provability (4a, at footnote No. 6), still, its lack of liquidation compared to the preciseness of Carvel's claim points out the irrational distinction in the treatment of the two classes of creditors under the general rule.

A word about the three month gap between rendition and entry. It should not be a factor here at all. The Court of Appeals says that "no reason appears as to why entry did not occur until three months after rendition" (7a) as if to say that under other circumstances a different result could be reached but here the penalty is earned. First, there were no laches here, nor were laches ever urged. Second, Greenfield filed his petition only one month after rendition so that after May 16, 1966 Carvel could not have entered prior to filing anyway. Moreover, the really diligent intentional tort-feasor could probably go around wreaking intentional injury at a point in time just before he files a bankruptcy petition and under the restrictive approach below thus make it impossible for his victim to be compensated. Under all of the circumstances, the qualifying remarks of the Court of Appeals on this point should count not at all here.

Conclusion

There should not be a distinction in treatment as to the two classes of creditors. All agree that such a distinction in treatment is peculiar and irrational. Worse, this distinction in treatment compels a destructive application of the statute with respect to the rights of a broad class of people with ascertainable claims who are left to the tender mercies

of their assailants with regard to cut off dates as to provability. Surely this result was unintended and is nothing more than the illogical continuation of ancient notions honoring commercial and property rights in preference to individual rights.

Fortunately there is an applicable exception within this case fits; because of this the decision below was erroneous. More important to this Court there is obviously an entire class of creditors who may not fit into one of the exceptions (even if the list of exceptions was not reduced as by the opinion below); as to these people, this court should now extend the availability of bankruptcy protections and prevent the destructive application of the statute.

It is therefore respectfully urged that the judgment of the United States Court of Appeals for the First Circuit should be reversed, and to that end the writ herein prayed for should issue.

Respectfully submitted,

LEONARD TOBOROFF,
Attorney for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7057.

COCLIN TOBACCO CO., INC.,

CREDITOR, APPELLANT,

v.

ROBERT J. GRISWOLD, TRUSTEE, ET AL.,

APPELLEES.

[IN THE MATTER OF LOUIS G. GREENFIELD, BANKRUPT]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

C. Delos Putz, Jr., with whom *Cadwalader, Wickersham & Taft* was on brief, for appellant.

Leonard Toboroff, with whom *Norman S. Isko* was on brief, for Carvel Creditors, appellee.

April 9, 1969.

COFFIN, *Circuit Judge*. This is an appeal from the United States District Court for the District of Puerto Rico sitting in bankruptcy. The issues presented for our determination pertain to the allowance of the claims of the two major unsecured creditors of the bankrupt estate —appellant Coclin Tobacco and appellee Carvel, Inc.

Louis G. Greenfield, the bankrupt, was a partner in the now defunct New York City law firm of Greenfield, Rothstein, Klein & Yarnell. Both claims involved in this appeal arose out of the activities of the bankrupt's law

firm. In the interest of clarity the factual background of each claim will be set forth separately.

In March, 1962, Coclin engaged the bankrupt's law firm for the purpose of bringing a private antitrust suit against Brown & Williamson Tobacco Company and British American Tobacco Company. Coclin paid a $15,000 retainer and on April 25, 1962, a complaint was filed in the Southern District of New York. In June of 1963 the bankrupt's law firm failed to appear when Coclin's case was called and the case was dismissed for lack of prosecution.

When Coclin discovered the dismissal it retained a new law firm and sought to restore the case to the docket. When attempts to restore the case failed, a new complaint was filed.[1]

Coclin seeks to recover $15,000 paid under the retainer and $15,000 alleged to have been expended in the attempt to restore the original complaint and in the filing of the new complaint. Coclin is a partnership creditor.[2]

Carvel's claim rests upon a judgment of the New York Supreme Court rendered against the bankrupt for conspiracy to bring false and baseless lawsuits. The memorandum of decision directing judgment for Carvel in the amount of $11,580,488.34 was issued on April 11, 1966.[3] The judgment was entered by the Clerk on July 25, 1966. Carvel is an individual creditor of the bankrupt.

On May 16, 1966, the bankrupt filed his petition in bankruptcy in the United States District Court for the District

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[1] The case was settled during the time that this appeal was pending.

[2] As a partnership creditor Coclin can share in the assets of the bankrupt estate, if at all, only after the payment of individual creditors. § 5(g), Bankruptcy Act, 11 U.S.C. § 23(g). Collier, Bankruptcy §§ 5.26-5.28 (1968).

[3] The Carvel claim was actually comprised of the claims of eight parties all of which were plaintiffs in the New York proceedings against the bankrupt.

of Puerto Rico. After receiving proofs of claim, the referee allowed Carvel's claims "provisionally" and disallowed Coclin's claims as being contingent and unliquidated.

The district court affirmed the referee, holding that under New York law there must be an abandonment by an attorney in order to entitle the client to recover money paid for legal services. The court found that Coclin had discharged the bankrupt's firm and therefore its claim was disallowed. The court then held that Coclin was not a "person aggrieved" under § 39 of the Bankruptcy Act, and therefore had no standing to seek review of the Carvel claims.

Coclin brings this appeal. We reverse for the following reasons. In rejecting Coclin's claim the court relied upon *Tenney* v. *Berger*, 93 N.Y. 524 (1883), as holding that there must be an abandonment of a cause by an attorney in order to justify recovery by a client. New York law is not so limited. It is clear that an attorney who is discharged for cause has no right to recover a fee and may be forced to remit a retainer paid in advance. *Rimos* v. *Rimos*, 81 N.Y.S.2d 347 (Sup. Ct. Sp. T. 1948); *See also Gonzales* v. *Hegner*, 192 N.Y.S.2d 212 (Sup. Ct. Sp. T. 1959); *Schwartz* v. *Tenenbaum*, 182 N.Y.S.2d 51 (1959); *In re Montgomery*, 272 N.Y. 323 (1936).[4]

The conduct of the bankrupt's law firm clearly constituted grounds for discharge; thus Coclin has a right to recover sums paid the firm for legal services. We take no position on the amount Coclin is entitled to recover[5] nor do we

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[4] The cases cited by appellee, Carvel, are strikingly inapposite. For example, *Martin* v. *Camp*, 219 N.Y. 170 (1916), merely states the rule that an attorney discharged without cause may recover in quantum meruit. *In the matter of Schneider*, 190 N.Y. 66 (1907), involved a clause in a retainer agreement providing that no fee would be paid if the case was settled. The court permitted the attorney who had settled the case to recover, holding such clauses to be against public policy.

[5] There are allegations in appellee's brief that $5,000 of the retainer was actually paid to Coclin's Connecticut counsel and that

comment on the question of the liquidation of Coclin's claim.[6] We say only that Coclin has a valid claim under New York law.

In light of our disposition of Coclin's claim, Coclin is clearly a "person aggrieved" under § 39 of the Act and is therefore entitled to seek review of Carvel's claim. In addition, Coclin has standing to seek review as the representative of the trustee, the estate, and all other creditors, a position which Coclin occupies by virtue of having sought and obtained such authority from the referee. *In re New England Tire & Rubber Co.*, 13 F.2d 1004 (D. Mass. 1926).

Carvel's claim is based upon the commission of an intentional tort by the bankrupt. As a general rule tort claims are not provable in bankruptcy. An exception exists —and it is the only exception for intentional tort claims— where the claim has been reduced to judgment *prior* to the filing of the petition in bankruptcy. *Lewis* v. *Roberts*, 267 U.S. 467 (1925); 3A Collier, Bankruptcy ¶ 63.25 [1] (14th ed. 1968).[7]

$5,500 was returned to Coclin by one of the bankrupt's law partners. The validity of these allegations and any other issues relating to the amount of Coclin's claim must be determined by the district court on remand.

[6] The unliquidated nature of Coclin's claim does not bar its provability under § 63 of the Bankruptcy Act, and ordinarily will not prevent its allowability unless the district court concludes that liquidation will require too much time and expense, § 57(d) Bankruptcy Act, 11 U.S.C. § 93(d). We leave this matter to the district court with the observation that it is the policy of the Bankruptcy Act to permit liquidation of claims by the district court where feasible. Cases are legion where the courts have liquidated damages arising out of the breach of unusual contracts. *See, e.g., Central Trust Co.* v. *Chicago Auditorium Ass'n.*, 240 U. S. 581 (1916) (contract by transfer company to carry baggage and passengers); *In re Hurbutt, H. & Co.*, 143 Fed. 958 (2d Cir. 1906); *In re Swift*, 112 Fed. 315 (1st Cir. 1901) (contracts to buy stock on margin). Of course, the claimant's duty to mitigate damages may be considered. *In re Dant & Dant*, 39 F. Supp. 753 (D. Ky. 1941).

[7] The peculiar treatment of tort claims in bankruptcy must be explained by resort to history rather than logic. Tort claims were restricted in provability in English law, probably because bankruptcy

The petition was filed on May 16, 1966, and Carvel's judgment was not entered by the Clerk until July 25, 1966. Carvel argues that under New York law the entry by the Clerk is merely a ministerial act and that the claim was actually reduced to judgment on April 11, 1966 when the memorandum of decision was issued.

Section 63(a)(1) of the Bankruptcy Act requires that the judgment evidence ". . . a fixed liability . . . absolutely owing at the time of the filing of the petition . . . whether then payable or not. . . ." Questions of the finality of a judgment are governed by the law of the rendering forum, *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946).

Our task is to determine whether under New York law entry of judgment is required in order to satisfy the demands of § 63(a)(1).

Our research has not disclosed, nor has counsel brought to our attention, any New York decisions which have directly considered the issue before us. Appellant relies on *Royal Baking Powder Co.* v. *Hessay*, 76 F.2d 645 (4th Cir. 1935), where the court refused to admit to proof a claim based on a New York judgment entered three days after the filing of the petition in bankruptcy. Despite the superficial resemblance of *Royal Baking Powder* to the case at bar, we think that it is clearly distinguishable.[8]

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was conceived as a means of dealing with commercial debts, and this restrictive approach was carried over to the Bankruptcy Act of 1898.

[8] In *Royal Baking Powder, supra*, the trial court sent its proposed findings and opinion to the clerk on March 10, 1931. The judge had not signed the opinion, and on March 12, 1931, several creditors of the bankrupt obtained a stay restraining the trial court from signing the opinion. On March 13, 1931, the bankruptcy petition was filed and on March 16, 1931, the stay was vacated by the trial judge who subsequently ordered the judgment amended nunc pro tunc so as to be dated March 12, 1931. In short, *Royal Baking* presented, on its facts, a stronger case for respecting the timing of the completion of formalities. In addition, we do not find the New York law relied upon by the court persuasive.

It is true, of course, that in entering a judgment a clerk does not perform a judicial function. However, it is equally clear that New York courts have looked at the criticality of the requirement of entry from the standpoint of the purpose to be served. Entry is necessary for certain purposes. Entry fixes the period for appeal, *Vogel* v. *Edwards,* 283 N.Y. 118, 27 N.E.2d 806 (1940), and entry tolls the period for computation of interest on a judgment. See § 5003, NYCPL&R; *Ariola* v. *Petro Trucking Corp.,* 270 N.Y.S.2d 309 (Sup. Ct. Sp. T. 1966). Most importantly, entry is a prerequisite to enforcement of a judgment through execution. § 5230, NYCPL&R; *Vogel* v. *Edwards, supra; Langrick* v. *Rowe,* 212 N.Y.S. 240 (Sup. Ct. Sp. T. 1925).

We recognize that some New York cases have held entry not to be necessary for certain purposes. *See; e.g., Vogel* v. *Edwards, supra; Langrick* v. *Rowe, supra; Brovender* v. *Williams,* 161 N.Y.S.2d 439, *appeal dismissed,* 167 N.Y.S.2d 922 (1957). However, in each of these cases the result may be explained by the specific issue before the court,[9] and perhaps most significantly, in none of these cases was the court called upon to decide whether an unentered judgment was "absolutely owing".

We think it beyond dispute that § 63(a)(1) of the Bankruptcy Act requires a "final" judgment. The basis for requiring finality is two-fold: first, that the amount of the claim be liquidated, and secondly, that the claim have merged in the judgment. Under the present state of the law the liquidation requirement is no longer critical in most cases. However, the prerequisite of merger remains unaltered by amendments to the Bankruptcy Act. To be sure merger is something of an artificial concept but we are not without some guidelines. For example, there can

[9] For example, in *Vogel* v. *Edwards, supra,* the issue before the court was whether emergency legislation concerning deficiency judgments should apply to a judgment rendered before but entered after enactment of the statute.

be no doubt that the rendition of a verdict, while liquidating a claim, does not result in merger and therefore is not provable in bankruptcy. *See, e.g., In re Ostrom,* 185 Fed. 988 (D. Minn. 1911); *Matter of Eads,* 17 Fed. 813 (D. Wash. 1926). When the requirement of § 63(a)(1) is viewed in that light, we believe it clear that under New York law a judgment is not final until entered. *See, Van Arsdale* v. *King,* 155 N.Y. 325, 329, 49 N.E. 866, 867 (1898); *Klepper* v. *Canadian Pacific Ry. Co.,* 193 Misc. 808, 85 N.Y.S.2d 258 (1948); *Matter of DiMaria,* 37 Misc.2d 617, 236 N.Y.S.2d 43 (Sup. Ct. 1963); *Matter of Diamond,* 37 Misc.2d 714, 235 N.Y.S.2d 505 (Sup. Ct. 1962), *aff'd mem.,* 240 N.Y.S.2d 954 (App. Div. 1963). *See also Concourse Super Service Station, Inc.* v. *Price,* 33 Misc.2d 503, 226 N.Y.S.2d 651 (Sup. Ct. 1962).[10]

No reason appears as to why entry did not occur until three months after rendition. "Under New York practice, as we understand it, the prevailing party may prepare the judgment to be entered, if indeed the clerk has not earlier entered it. 9 Carmody-Waite, Cyclopedia of New York Practice, § 63.91-63.113. Even assuming that the delay was due solely to the inaction of the clerk, appellee could have obtained an order from the trial court compelling entry of the judgment. *Cf. Greenwich Bank* v. *Hartford Fire Ins. Co.,* 250 N.Y. 587, 116 N.E. 334 (1929)."[11]

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[10] *In the matter of Diamond, supra,* and *In the Matter of DiMaria, supra,* provide particularly helpful illustrations of the effect of entry on finality. In both cases the defendant sought to escape arbitration on the ground that the claim had been reduced to judgment. However, in both cases the court held the defense invalid because there had been no entry of judgment and therefore the claim had not merged in a judgment.

[11] Appellee urges that *In re Ganet Realty Corp.,* 9 F. Supp. 246 (S.D.N.Y. 1935) is authority for allowance of its unentered judgment. We do not agree. The claim involved in that case was one for mortgage deficiency and would have been provable without a final judgment—the only question being one of liquidation. As the court in that case pointed out, the order of sale entered before bankruptcy conclusively fixed the amount of the claim.

We recognize that our opinion may appear to display an undue concern with technical distinctions. The appearance is unavoidable since § 63(a)(1) of the Bankruptcy Act requires that we divine the mysteries of New York civil practice. The result reached is also unavoidable. Congress has provided a narrow avenue for the proof of intentional tort claims in bankruptcy. Nothing in the merits of Carvel's claim or in the policies of Bankruptcy Act justifies departure from the Congressional prescription.

Reversed and remanded for proceedings consistent with this opinion.

A True Copy

ATTEST:

ROGER A. STINCHFIELD, Clerk

By GRACE V. CAREY
Deputy Clerk.

[SEAL]